Supreme Court, U.S.
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No. 03-

In The
Supreme Court of the United States

CALIFORNIA TROUT, INC.

Petitioner,

v.

UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION, SOUTHERN CALIFORNIA EDISON COMPANY

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review

1. Whether an annual license issued by the Federal Energy Regulatory Commission (FERC) to a hydropower licensee under Section 15(a)(l) of the Federal Power Act, 16 U.S.C. § 808(a)(l) [FPA § 15(a)(l) is a federal license or permit subject to State Water Quality Certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a) [CWA § 401(a)(l)]; and

2. Whether FERC's issuance of annual licenses under FPA § 15(a)(l) on May 1, 2000 (and subsequent annual licenses) to hydropower licensee Southern California Edison (SCE) for the Santa Ana River No. 1 and 2 Project, without obtaining California State Water Quality Certification, violated CWA § 401(a)(l)'s requirement that any applicant for a federal license or permit to conduct any activity that may result in a discharge into the navigable waters shall provide the agency with a certification from the State that any such discharge shall comply with CWA §§ 301-303 and 306-307, and violated CWA § 401(a)(l)'s prohibition that no license or permit shall be granted until State Certification has been obtained or waived.

List of the Parties to the Proceeding

The Parties to this proceeding are:

Petitioner California Trout, Inc.

Respondent Federal Energy Regulatory Commission

Respondent Southern California Edison Company

Corporate Disclosure Statement

Petitioner California Trout, Inc. (Petitioner or "Cal Trout") is a California non-profit, public benefit corporation dedicated to the preservation of the rivers, streams and other inland waters of the State of California and the trout, salmon and steelhead that inhabit them. Cal Trout has more than 5,000 members, most of whom are citizens of the State of California and many of whom live near or use the Santa Ana River at or near the hydro power project that is the subject of this proceeding. Cal Trout is not owned, in whole or in part, by any other entity.

Dated: May 27, 2003

Respectfully submitted,

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, California Trout, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I. Opinions and Decisions Below

This Petition seeks a writ of certiorari to review an opinion of a Panel of the Ninth Circuit Court of Appeals (Justices Johnnie Rawlinson and David Thompson and District Judge William Schwarzer) found at *California Trout Inc. v. Federal Energy Regulatory Commission, Southern California Edison Company, 313 F.3d 1131 (9th Cir. 2002). (See Appendix A).*

The Panel denied Petitioner's timely Petition For Panel Rehearing En Banc by Order dated February 28, 2003. (See Appendix B).

The Opinion affirmed an order of the Federal Energy Regulatory Commission (FERC) rejecting Petitioner's Petition for Rehearing, titled "Order Dismissing Request for Rehearing and Denying Petition" (issued March 19, 2001), found at 94 FERC § 61, 326. (See Appendix C).

II. Statement of Jurisdiction in this Court

The Order of the Ninth Circuit Court of Appeals of which Petitioner seeks review was dated December 16, 2002. Petitioner timely filed a Petition for Panel Rehearing and Rehearing En Banc, which the Ninth Circuit denied on February 28, 2003.

A. Statutory Provision Conferring Jurisdiction On the Supreme Court To Review The Order In Question

Decisions of the Court of Appeal are reviewable by Writ of Certiorari granted on the Petition of any party under 28 U.S.C. § 1254.

B. The Basis of the Ninth Circuit's Jurisdiction

The Court of Appeals has jurisdiction to review directly final orders by FERC, 15 U.S.C. § 717r; 16 U.S.C. § 8251(b); *Publ. Util. Comm'n of the State of Calif. v. FERC*, 100 F.3d 1451, 1457 (9th Cir. 1996).

III. Statutes and Regulations Involved in the Case

Federal Power Act, § 15(a)(1), 16 USC § 808(a)(1): "§808. New licenses and renewals"

Clean Water Act, § 401(a)(1), 33 USC § 1341(a)(1): "§1341. Certification" (See Appendix D).

IV. Statement of the Case

This is a Petition For Review of a final order by Respondent FERC dated March 19, 2001, denying Cal Trout's challenge to FERC's issuance of annual licenses effective May 1, 2000 (and subsequent annual licenses), which allowed Respondent, Southern California Edison Company ("SCE") to operate the Santa Ana River Hydroelectric Project No. 1 and No. 2 ("the Project"), in San Bernardino County, California. Petitioner submits that FERC improperly issued the annual licenses without requiring SCE to obtain water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. 1341 ("CWA § 401") from the California State Water Resources Control Board ("SWRCB"). Accordingly, FERC's issuance of the annual licenses was and is in violation of CWA § 401.

A. SCE's Original License To Operate The Project And Request For Renewal Of Its Long Term License.

On July 21, 1947, FERC issued a 50 year license, effective May 1, 1946, authorizing SCE to operate the Project. This original 1947 license expired on April 30, 1996. [FERC Admin. Record (CR), Petitioner's Excerpts of Record (ER), No. 2, pp. 28-30]

The Project includes diversions of the surface flows from the Santa Ana River, including from Reaches #1 and #2, for a distance of about 7 miles, in the San Bernardino National Forest. SCE's diversions were and are made through a diversion dam and flowline with a capacity of 82.6 cubic feet per second (cfs). The SAR#1 and #2 Reaches of the Santa Ana River naturally have perennial flows and normal unimpaired surface flows during the summer months are about 35 to 66 cfs, with a minimum

of 5 to 25 cfs. The SAR#1 and #2 Reaches of the River have been designated by the California Regional Water Quality Control Board, Santa Ana Region (SARWQCB), and the SWRCB, in water quality standards in the Basin Plan, as having the beneficial use of cold water fishery habitat and spawning, including for self-sustaining populations of rainbow trout. [CR 12, ER 5, pp. 5, 45-53; Pet.'s Reqt. For Judicial Notice (JN), No. 6]

On April 23, 1991, SCE filed its notice of intent to apply for relicensing for the Project with FERC, in accordance with FPA §15(b), which requires an existing licensee to give notice 5 years before the expiration of the license whether the licensee intends to apply for relicensure and to begin consultation with state and federal agencies regarding environmental matters. On April 29, 1994, two years before the expiration date of the original license, as required by FPA §15(c), SCE filed an application with FERC for renewal of its license to operate the Project. (CR 1, ER 3, pp. 31-40)

B. The Failure To Obtain State Water Quality Certification Under CWA § 401.

On May 2, 1994, SCE applied to the SWRCB for water quality certification for relicensing (for another 50 year term) of the Project under CWA § 401. SCE's Application provided that there would be a bypass flow of 4 cfs in Reach 1, and no bypass flow in Reach 2. (CR 11, ER 5, pp 45-53). The SWRCB denied without prejudice SCE's application for water quality certification for relicensing the Project by letter dated April 18, 1995. The SWRCB stated the proposed bypass flow of 4 cfs in Reach 1 would result in no surface flow, and SCE's application did not indicate whether the proposed 4 cfs bypass flow would achieve and maintain the beneficial uses of water and meet the water quality objectives listed in the Basin Plan throughout Reach 1. The SWRCB noted that SCE proposed to continue to divert the entire streamflow and to have a zero bypass flow in Reach 2, and that SCE did not model this Reach nor provide any

data on the stream bypass flows needed to achieve and maintain the beneficial uses of water and the water quality objectives listed in the Basin Plan throughout Reach 2. [CR 22, ER 9, pp. 60-63).

SCE filed a petition for reconsideration with the SWRCB and requested that the matter be held in abeyance. The SWRCB agreed to hold SCE's petition for reconsideration in abeyance for 2 years, until May 17, 1997 but informed SCE that if SCE did not resolve the water quality issues by that date, the petition for reconsideration would be dismissed. (CR 26, 28; ER 10-11, pp. 64-68)

In July, 1997 and March, 2000, SCE reiterated its request that the SWRCB continue to hold in abeyance SCE's Petition for Reconsideration, and on each occasion, the SWRCB agreed to and did so through March 19, 2002. The SWRCB stated that it was addressing only the certification for long-term relicensing of the Project, and not whether it is appropriate for FERC to issue annual licenses for the Project without water quality certification or whether and on what conditions the SWRCB would issue certification for an annual license. (CR 112, 154, 224; ER 18, 19, pp. 85-86) Since March 19, 2002, SCE has filed a new application with the SWRCB for Water Quality certification for a long term license. On March 13, 2003, SWRCB issued a certification for a long term license, which included conditions for water quality and required flows. FERC has continued to issue annual licenses for the operation of the Project which do not have the water quality conditions and other terms in the SWRCB's certification, and has not yet issued a new long term license.

C. FERC's Issuance Of Annual Licenses Without State Water Quality Certification.

On May 7, 1996, after SCE's 1947 license had expired, while SCE's relicensing application was pending with FERC, and after the SWRCB had denied without prejudice certification of SCE's application for

relicensing, FERC issued an order granting SCE an annual license to operate the Project for the period May 1, 1996 through April 30, 1997, on the terms and conditions provided for under the original 1947 license. Each year thereafter on the May 1st anniversary of the expiration of SCE's license—from 1997 to date, FERC granted and issued annual licenses for SCE to continue operating the Project, on the same terms and conditions as the original 1947 license. No request for State certification under CWA § 401 was made or granted regarding the annual licenses. FERC did not condition the granting of any of these annual licenses on SCE obtaining a water quality certificate from the SWRCB under CWA § 401, or on the conditions in the State's recent certification for a long-term license. (CR 56, ER 15, p. 15)

D. The Proceedings Before FERC.

After SCE filed its Notice of Intent to File Application for Relicensing and its Application For License for FERC Project No. 1933, on July 9, 1996, FERC issued a Notice that the Application by SCE had been accepted for filing regarding relicensing of FERC Project No. 1933. On September 18, 1996, Petitioner Cal Trout filed its Motion To Intervene in FERC Proceedings regarding FERC Project No. 1933. (CR59,70). By letter dated September 13, 1995, FERC notified SCE that on April 18, 1995, the SWRCB had denied SCE's initial request for water quality certification of the Project. FERC informed SCE that CWA § 401 prohibits FERC from issuing a hydropower license until water quality certification of the Project is granted or waived by the State, and that FERC policy required that SCE either appeal the State's denial or file another request for certification within 90 days. (CR 40, ER 12, pp 69-70).

Nevertheless, on May 7, 1996, FERC issued a Notice of Authorization for Continued Project Operation, issuing an annual license to SCE under the terms and conditions of the expired prior 50 year license for the period of May 1, 1996 through April 30, 1997, and stating that if no new

license or other disposition occurred by then, that an annual license under FPA § 15(a)(1) is renewed automatically without further order unless FERC orders otherwise. FERC issued annual licenses every May 1st during the years 1996 through 2003. (CR 7, 56; ER 2, 15, pp. 15, 28-30).

On or about May 31, 2000, Petitioner filed with FERC a timely Application and Petition For Rehearing and Vacation of FERC's issuance of the May 1, 2000 annual license and subsequent annual licenses. Cal Trout's Petition challenged FERC's issuance of the May 1, 2000 and subsequent annual licenses without compliance with CWA § 401. (CR 226, ER 20, pp. 87-104).

On June 21, 2000, FERC issued its Notice Rejecting Request For Rehearing. FERC ruled that FPA § 15(a)(1) mandates that an annual license be issued, and requires that it be issued under the terms and conditions of the existing license. FERC stated that issuance of the annual license is a ministerial and non-discretionary act and is not a FERC licensing action under the FPA. (CR 230, ER 21, p. 105-106).

On July 20, 2000, Cal Trout filed a timely Request for Rehearing of FERC's Order Denying Request for Rehearing dated June 21, 2000. On August 18, 2000, FERC issued an order granting rehearing for the limited purpose of further consideration of the matters raised in Cal Trout's Request for Rehearing, which stayed further proceedings and Cal Trout's challenge to the May 1, 2000 annual license pending a determination by FERC. (CR 232, 234; ER 22, 23, pp. 107-125, 156).

On March 19, 2001, FERC issued an order denying Cal Trout's original May 31, 2000 petition for review of FERC's issuance of the May 1, 2000 and subsequent annual licenses. FERC determined that Cal Trout's challenge to the May 1, 2000 annual license was allegedly not well taken because: (1) the issuance of an annual license is a non-discretionary, mandatory act; and (2) the issuance of an annual license, unlike a license or renewal

of a license, is purportedly not subject to water quality certification under CWA § 401. (CR 234, ER 24, pp. 157-170; Appendix C).

E. The Proceedings Before the Ninth Circuit.

On May 16, 2001, Cal Trout timely petitioned to the Ninth Circuit Court for review of FERC's March 19, 2001 Order.

On September 20, 2001, after Petitioner filed its Opening Brief, FERC filed a Motion To Dismiss Petitioner's Petition for Review For Lack of Jurisdiction under 16 U.S.C. §825(l) on the ground that Petitioner had not filed a Petition for Rehearing within 30 days of FERC's May 7, 1996 Notice of Authorization for Continued Project Operation, and did not petition for rehearing until May 31, 2000, regarding FERC's 2000 and subsequent annual licenses. On December 26, 2001, the Ninth Circuit denied without prejudice FERC's Motion to Dismiss, which FERC and Respondents SCE reiterated in their Answer Briefs filed about February 27, 2002.

On December 16, 2002, the Panel (Justices Rawlinson and Thompson and Judge Schwarzer), issued an opinion which upheld Petitioner's right to Petition for rehearing regarding the year 2000 and subsequent annual licenses, but denied the petition on the merits. The Panel deferred to FERC's interpretation that an annual license under FPA § 15(a)(1) is a ministerial and nondiscretionary act which is not a federal licensing action subject to CWA § 401's requirement that a federal license or permit obtain State Water Quality certification. On February 28, 2003, the Panel denied Petitioner's Petition For Panel Rehearing and Rehearing En Banc. (Appendices A, B).

V. Argument

A. Introduction

Petitioner hereby petitions for a Writ of Certiorari of the Panel Opinion filed by the Ninth Circuit Court of Appeal on December 16, 2002, which denied Petitioner's Petition to Review FERC's March 19, 2001 Decision declaring that an FERC annual license under FPA § 15(a)(1) is not a federal license and not subject to CWA § 401's requirements that any federal license or permit that may result in a discharge requires State Water Quality certification.

The grounds for this Petition are that:

1. The Panel Opinion conflicts with the plain meaning of "annual license" in FPA § 15(a)(1) and "federal license" in CWA § 401(a)(1), with the U.S. Environmental Protection Agency's (USEPA's) definition of "federal license" under CWA § 401, with decisions of the United States Supreme Court in *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994), and *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936), and with decisions of the Circuit Courts, including *American Rivers, Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997); *United States v. Marathon Dev. Corp.*, 867 F.2d 96 (1st Cir. 1989); *Keating v. FERC*, 927 F.2d 616 (D.C. Cir. 1991); *Monongahela Power Co. v. Marsh*, 809 F. 2d 41, 53 n. 116-117 (D.C. Cir. 1989), *Alabama Rivers Alliance v. FERC, 325 F.3d 290 (D.C. Cir. 2003),* and consideration by the Supreme Court is necessary to secure and maintain uniformity of the Court's decisions; and

2. The Proceeding involves a question of exceptional importance—whether FERC annual licenses for hydropower projects issued under FPA § 15(a)(1), 16 U.S.C. § 808(a)(1) are "federal licenses or permits" subject to the requirement for State water quality certification under CWA § 401(a)(1), 33U.S.C.§1341(a)(1).

The Panel Opinion improperly endorsed FERC's erroneous interpretation of the meaning of "annual

license" under FPA § 15(a)(l) and of "federal license" under CWA § 401. FERC asserts that a FERC annual license under FPA § 15(a)(1) is a ministerial, non-discretionary statutory mechanism that requires the FERC to authorize continued project operation under the terms and conditions of the original license and is therefore purportedly not a license that triggers State water quality certification under CWA § 401(a)(1). (App. 10a). Yet FPA § 15(a)(1) expressly describes a FERC annual license as a "license". CWA § 401 requires State certification for all federal licenses and permits to conduct activities which may result in a discharge to waters of the United States. CWA § 401 mandates that "No license or permit shall be granted until" State certification is obtained or waived.

The question of whether FERC annual licenses are federal licenses requiring State certification under CWA § 401 is of exceptional importance because of FERC's widespread issuance of annual licenses to hydropower projects with expiring long term licenses. Projects operated under annual licenses incorporating pre-CWA license terms avoid compliance with the water quality standards and objectives of the CWA. Prior to the adoption of the CWA in 1972, FERC's predecessor the Federal Power Commission (FPC) had issued hundreds of long term hydropower licenses for Projects which did not comply with the water quality standards and objectives of the CWA. In California alone there are 51 long term hydropower licensed projects that are expiring during 1993 to 2010. As the licenses for these Projects expire, FERC has been issuing annual licenses to the projects based on the terms and conditions of the expired licenses and has thereby avoided CWA compliance by these Projects. As examples, FERC issued annual licenses on the Mokelmne River and Rock Creek Cuesta Projects for 18 years and 25 years, respectively, and has issued annual licenses on the subject Project for 7 years, based on the terms of the pre-CWA licenses. (JN, 1,2). The

Ninth Circuit's Opinion would perpetuate the issuance of FERC annual licenses for multiple years to hydropower projects to avoid their compliance with the CWA.

In creating this unauthorized exception for FERC annual licenses from CWA § 401's prohibition against the issuance of federal licenses without State certification, the Panel Opinion commits the following errors of law:

1. The Panel wrongly disregarded the plain meaning of "annual license" in FPA § 15(a)(1) and "federal license" in CWA § 401, and ignored the Supreme Court's *Jefferson* holding that "federal licenses" under CWA § 401 include FERC hydropower licenses, to erroneously conclude that an annual license by FERC, a federal agency, is not a "federal license" under CWA § 401 subject to State certification;

2. The Panel, in erroneously construing FPA § 15 and CWA § 401 to exempt FERC annual licenses from CWA § 401, relies on inapplicable rules, and disregards governing rules, of statutory construction under applicable Supreme Court's decisions;

3. The Panel improperly gave *Chevron* deference to FERC's interpretation of "annual license" in FPA § 15(a)(1) and "federal license" in CWA § 401, and ignored the USEPA's definition of "federal license" under CWA § 401, to wrongly conclude that a FERC annual license is not a federal license requiring State certification; and

4. The Panel's opinion that Congress intended to give States control only over new or altered projects and not over continued operation of an expiring licensed project pending relicensing is contrary to CWA § 401's statutory language and to express Congressional intent that renewals of FERC licenses are subject to CWA § 401's requirement of State certification.

B. The Plain Meaning of CWA § 401(a)'s Requirement of State Certification and Its Prohibition Against A Federal Agency Issuing A License Or Permit Without State Certification Precludes FERC's Issuance Of Annual Licenses

Under FPA § 15(a)(1) Where As Here The State Did Not Grant Or Waive Certification.

1. The issuance of an annual license by FERC constitutes a licensing action under the terms of the Federal Power Act (FPA) and the Clean Water Act (CWA).

FERC argued and the Panel erroneously agreed that a FERC annual license under FPA § 15(a)(1) is not a federal license under the FPA which is subject to CWA § 401. FERC's contention conflicts with the plain language of the FPA and of the CWA, with EPA regulations defining federal license under CWA § 401, and with the Supreme Court's decision in *Jefferson*. FERC's annual licenses under FPA § 15(a)(1) clearly constitute federal licenses. They are subject to the requirement of state water quality certification under CWA § 401(a) and to the prohibition against issuance of such federal licenses without obtaining or waiving state certification.

When construing statutes such as the FPA and the CWA, the starting point is the language of the statute itself. *Chevron v. Natural Resources Defense Council*, (1984) 467 U.S. 837, 842. Courts "assume that the legislative purpose is expressed by the ordinary meaning of the words used." *United States v. James*, (1986) 478 U.S. 597, 604 (quoting *American Tobacco Co. v. Patterson*, (1982) 456 U.S. 63, 68. In this case, the plain language of the FPA and the CWA demonstrates that an annual license is a license for the purposes of both statutes.

The FPA was adopted by Congress in June, 1920. 41 Stat. 1077. The FPA authorizes FERC "to issue licenses...for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works ...for...navigation and...power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce..." FPA § 4(e), 16 U.S.C. § 797(e). Section 6 of

the FPA (16 U.S.C. § 799) provides that licenses shall be issued for a period not exceeding fifty years.

Section 15 of the FPA (16 U.S.C. § 808) is titled "new licenses and renewals." Subsection (a) addresses "relicensing procedures; terms and conditions." Subsection (a)(1) provides that "if the United States does not at the expiration of an existing license exercise its right to take over and operate any project of the licensee, the Commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee.." Subsection (a)1 further states, "Provided, That in the event the United States does not exercise the right to take over and does not issue a new license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid."

FPA § 15(b) requires each existing licensee to notify the Commission at least five years before expiration of the existing license whether the licensee intends to file application for a new license or not. Subsection (c) provides that each application for a new license shall be filed with the Commission at least 24 months before the expiration of the term of the existing license, and the applicant shall consult with the fish and wildlife agencies. Subsection (e) provides "except for an annual license, any license issued by the Commission under this section shall be for a term...not less than 30 years, nor more than 50 years..."

A license is "official or legal permission to do or own a specified thing." *The American Heritage Dictionary, (2d Ed. 1991) Houghton Mufflin Co.* An "annual license" under FPA § 15(a)(1) permits the operation of a hydropower project and is clearly a license.

CWA § 401 was originally adopted as Section 21(b) of the Water and Environmental Quality Improvement Act of 1970, PL 91-224, 84 Stat. 91 (1970) (WQIA). It required that any applicant for a federal license or permit to conduct an activity which may discharge to waters of the United States provide the federal agency issuing the license or permit with a certification from the affected State that the activity will be conducted in a manner that will not reduce the quality of water below the applicable water quality standards. Section 21(b) of the WQIA likewise provided that no federal license or permit shall be granted unless the certification has been first obtained or there has been a waiver of the requirement, and prohibited the issuance of a federal license or permit when the State denied certification. *Id.* The 1972 Federal Water Pollution Control Act Amendments included Section 21(b) as Section 401 of the CWA. PL92-500 (1972). The 1977 Clean Water Act Amendments continued Section 401 in the CWA. PL 95-217 (1977).

CWA § 401(a)1 provides that:

> "Any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate,...that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title....If the State,...fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until certification required by this section has been obtained or waived as provided in the preceding

sentence. No license or permit shall be granted if certification has been denied the State,..., as the case may be."

The USEPA is the enforcing agency for the CWA and has adopted implementing regulations for the Act. USEPA's regulations for CWA § 401 define federal "license or permit" covered by the Section as "any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge to the navigable waters of the United States." 40 C.F.R. Part 121, Section 121.1. There is no exception to the definition of license in the regulations.

FERC hydroelectric licenses, whether annual or long term, are clearly federal licenses subject to CWA § 401 state certification. As the Court stated in *Alabama Rivers Alliance, supra at 325* F.3d.292-4, "Although 'the FPA represents a congressional intention to establish a broad federal role in the development and licensing of hydroelectric power," the CWA 'has diminished [the FPA's] preemptive reach by expressly requiring the Commission to incorporate into its licenses state-imposed water quality conditions.' ...FERC's hydroelectric licenses are thus subject to, among other conditions, the requirements of Section 401 of the CWA...The required certification must provide that such discharge will comply with the applicable water quality standards of the CWA, as well as with any other appropriate requirement of state law...Any limitations included in the state certification become a condition on the federal license...If the 'originating' state denies an applicant Section 401(a)(1) certification, FERC may not issue that applicant a hydroelectric license. *Id.*.

FERC's issuance of the annual license order of May 7, 1996 and its renewal of the expired SCE 50 year license by the issuance of annual licenses from May 1996 to date--over 7 years-- constituted the issuance of federal licenses. The annual licenses issued by FERC to SCE for the FERC Project No. 1933 since May 1996 may result in

a discharge to the waters of the U.S. and are clearly subject to CWA § 401(a)1.

2. Regardless of whether FERC's issuance of an annual license under FPA 15(a) is a ministerial act, CWA § 401 prohibits any federal agency including FERC from issuing any license including a license renewal by annual license, that may result in a discharge without State certification.

FERC contended, and the Panel concluded, that because FPA § 15(a)(1) provides that FERC "shall" issue an annual license from year to year, that an annual license is not a federal license subject to CWA § 401 state certification. The Panel further erroneously asserted that FERC's interpretation that an annual license is not a license that triggers the requirement of State certification under CWA 401 conforms to "settled law."(App. 10a-11a).

FERC's contention that FPA § 15(a)(1) uses the word "shall" regarding the issuance of an annual license does not justify the exemption of an annual license under the FPA, adopted in 1920, from CWA § 401, adopted as § 21(b) of the WQIA in 1970 and readopted as § 401 of the CWA in 1972. CWA § 401(a)(1) requires state certification of any federal license or permit and provides that no federal license or permit shall be granted until water quality certification for the license has been obtained from or waived by the State. A FERC annual license is a federal license which may result in a discharge to the United States. Accordingly, CWA § 401 requires State certification for such a federal license to be issued. Where, as here, the State has not granted or waived certification as to the annual licenses, no federal license or permit including a FERC annual license may be granted.

The "settled law" to which the Panel refers—*Platte River Whooping Crane v FERC*, 876 F.2d 109, 114 (D.C. 1989);(*Platte I*); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Comm'n*, 510 F.2d 198 (D.C.Cir. 1975)(*Lac Courte*); and *Platte*

River Whooping Crane Trust v. FERC, 962 F.2d 27 (D.C.Cir. 1992)(*Platte II*)—does not support FERC's and the Panel's proposition that a FERC annual license is not a license and therefore is not subject to CWA § 401. To the contrary, these cases state than an annual license is a federal license issued by FERC, a federal agency. None suggest that an annual license is not a licensing action. *Platte I* stated that "while the issuance of the annual licenses is indeed a nondiscretionary act, ...the commission does have the authority to formulate conditions for both licenses" and "FERC's refusal to preliminarily assess environmental issues (when granting annual licenses) amounted to an abuse of discretion." *Platte I, supra.* at 876 F.2d 114, 117. *Lac Courte,* supra. at 510 F.2d 198, involved a project which federal agencies recommended the U.S. recapture under FPA 14, and the Court held that where Congress was considering recapture of the Project the issuance of an annual license was mandatory under FPA § 15(a)(1). Here there is no proposal for recapture. None of these cases arose under or presented the question of whether the issuance of annual licenses under the FPA of 1920 is subject to the requirement of State certification of federal licenses under the subsequently enacted CWA of 1972, as this case does. Thus, these cases do not provide any support for FERC's and the Panel's erroneous proposition that an annual license is not a federal license subject to CWA § 401.

In *Jefferson,supra. at 511 U.S. 709, 723,* this Court held that the requirement for state certification applies to all federal licenses and permits for activities which may result in a discharge including licenses from FERC. In *Jefferson,* applicants proposing to build a hydroelectric project to divert water from a reach of the Dosewallips River in Washington were required to obtain a FERC license to build or operate the project under the FPA. Because a federal license was required and the project may result in discharges into the River (including the

discharge of water at the end of the tailrace), "petitioners are also required to obtain state certification of the project pursuant to Section 401 of the Clean Water Act." *Id.*, at 511 U.S. 709. The Court held that "the requirement for a state certification applies not only to applications for licenses from FERC, but to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters.... " *Id*, at 511 U.S. 723.

FERC-issued licenses, including annual licenses under the FPA, may result in a discharge to the waters of the United States. The Supreme Court expressly held that FERC licenses involve discharges to waters of the U.S., including discharges of water from the tailrace and discharges of dredge and fill material or of sand, gravel and rocks from discharges from operations, and are therefore licenses subject to CWA § 401. *Jefferson*, supra, at 511 U.S. 723. The FERC annual licenses, like the original license and any renewal license, for FERC Project 1933, likewise involve discharges from the diversion structures and of sand, gravel rock and dirt to waters of the United States. (CR 11, 12; SCE App., p. E2-4-5, HB 19, Ex. F). The FERC annual licenses are clearly federal licenses which are not exempt from but rather are subject to the requirements of CWA § 401 regarding State Water Quality certification.

3. Where two statutes potentially conflict, as FERC contends the annual license provision of FPA § 15(a) does with the State certification provision of CWA § 401(a)1, they should be harmonized whenever possible, and the latter to the extent of the conflict constitutes an implied repeal of the earlier one. Thus, a FERC annual license renewal under § 15(a) of the 1920 FPA is subject to State certification under § 401(a)1 of the 1972 CWA.

FERC in its Order and the Ninth Circuit in its Panel Opinion fail to acknowledge that, notwithstanding the

purportedly ministerial nature of FPA § 15(a)(1), CWA § 401(a)(1) bars FERC from issuing any federal license that may result in a discharge, including an annual license, in the absence of State Water Quality certification. Federal agencies, like the courts, should harmonize conflicting statutory provisions whenever possible. FERC and the Ninth Circuit should and could have interpreted the FPA's annual licensing provisions consistently with the CWA. The only way to harmonize FPA § 15(a)(1) and CWA § 401(a) is to recognize that, because FPA § 15(a)(1) involves federal licensing subject to the CWA, CWA § 401(a) implicitly conditions FPA § 15(a)(1) so that the issuance of FERC annual licenses is subject to State certification and conditions thereon. Under a harmonized construction, FERC may still issue annual licenses under FPA § 15(a)(1) so long as the State has granted or waived water quality certification for the licensed activity.

Even if FPA § 15(a)(1) and CWA § 401(a) were irreconcilable and could not be harmonized, then CWA § 401 would act as an implied repeal of FPA § 15(a)(1) to the extent they are inconsistent. The Supreme Court has held that where provisions of two statutes conflict irreconcilably, "the latter to the extent of the conflict constitutes an implied repeal of the earlier one." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). Although repeals by implication are not favored, courts will find a repeal "when the new statute is clearly repugnant, in words or purpose, to the old statute." *Grindstone Butte Project v. Kleppe*, 638 F.2d 100, 102 (9th Cir. 1981). Thus, if FERC's and the Ninth Circuit Panel's interpretation of FPA § 15(a)(1) absolutely precludes conditioning the issuance of annual licenses on CWA § 401 certification, then the only alternative would be to consider FPA § 15(a)(1) to have been implicitly repealed by Congress.

Accordingly, it is clear that FERC-issued licenses including annual licenses are subject to CWA § 401. Where, as here, the State has not granted or waived Water Quality certification, FERC may not issue a

federal license including the annual licenses for a hydroelectric project such as Project No. 1933.

C. The Ninth Circuit Panel wrongly disregarded the plain meaning of "annual license" in FPA § 15 (a)(1) and "federal license" in CWA § 401, and ignored the Supreme Court's *Jefferson* holding that all federal and FERC licenses are subject to CWA 401, to erroneously conclude that an "annual license" issued by FERC is not a "federal license" under CWA § 401 subject to State certification.

The Panel's determination that "reading § 15(a)(1) and § 401(a)(1) in context, we conclude that Congress did not intend 'Applicant' to have its literal effect so as to include a recipient of an annual license" (App. 12a-13a) is admittedly contrary to the plain meaning of CWA § 401 that all federal licenses which may result in a discharge require State water quality certification, including renewals of existing licenses by way of annual licenses.

The Panel erroneously affirmed FERC's decision that the issuance of an annual license under FPA § 15(a)(1) is ministerial and non-discretionary and therefore is not a licensing action that triggers CWA § 401's requirement of State certification. (App. 10a). FPA refers to an "annual license" as a license issued by FERC, a federal agency. FPA § 15(a), titled "New licenses and renewals," refers to annual licenses as "renewals" of existing licenses and provides in pertinent part that "in the event the United States does not exercise the right to take over or does not issue a license to a new license, or...to the existing licensee,...then the Commission shall issue from year to year an annual license under the terms and conditions of the existing license..." FPA § 15(e) provides that "except for an annual license, any license issued by the Commission...shall be for a term...not less than 30 years, nor more than 50 years..." Likewise, FERC has issued regulations describing annual licenses as federal licenses ["New license means any license, except an annual license issued under § 15 of the FPA, for a water power project..."

(18 CFR 4.30(b)(19))]. By the express terms of the FPA, an "annual license" is a federal license under CWA § 401(a)(l). A FERC annual license is subject to CWA § 401's provisions that "any applicant for a Federal license or permit to conduct any activity...which may result in any discharge to the navigable waters, shall provide...a certification from the State" of compliance with the CWA, and "No license or permit shall be granted until the certification" has been obtained or waived.

Further, the Panel's decision ignores and is contrary to: 1) the U.S. Supreme Court's decision in *Jefferson* , *supra*, at 511 U.S. 711-712, 723; 2) the decisions of all circuit courts addressing whether various types of licenses and permits issued by federal agencies including FERC are subject to CWA § 401 state certification; and 3) the EPA's regulations defining "federal license" under CWA § 401.

The Supreme Court in *Jefferson* upheld the State's CWA § 401 certification of a FERC hydropower license conditioned on the maintenance of minimum stream flows to protect salmon and steelhead runs. *Jefferson* held that: 1) it is the EPA's interpretation of the CWA which is entitled to deference, 2) the category of activities subject to certification (under CWA § 401) are those that may result in a discharge, and 3) CWA § 401 "requires an applicant for a federal license or permit to conduct any activity 'which may result in any discharge into the navigable waters'" to obtain State certification that "the activities will be conducted in a manner that will not violate applicable water quality standards." *Id.*, at 511 U.S. 707, 711-712. *Jefferson* held that FERC's license of the Project was within the scope of CWA § 401 "because a federal license is required, and because the project may result in a discharge." *Id.*, at 511 U.S. 709. The Supreme Court held that "the requirement for a State certification applies not only to applications for **licenses from FERC**, but to **all Federal licenses and permits** for activities which may result in a **discharge** into the nation's navigable waters." *Id.*, at 511 U.S. 722. The Ninth

Circuit Panel's opinion that FERC annual licenses are not subject to State certification under CWA § 401 is contrary to the Supreme Court's ruling in *Jefferson* that the requirement of State certification applies to all federal licenses and permits including all FERC licenses for activities which may result in a discharge.

Second, all Circuit Courts addressing the various types of licenses and permits issued by federal agencies—including numerous FERC licenses-- have held that so long as the licensed activity may result in a discharge it is subject to CWA § 401 State certification. See, e.g., *Alabama Rivers Alliance, supra. at 325* F.3d 292-4 (amendment to FERC license authorizing replacement of turbines which may increase discharge rate) *American Rivers Inc. v. FERC*, 129 F2d 99 (2d Cir. 1997) (FERC hydropower license); *City of Fredericksburg, Va. v. FERC*, 876 F2d 1109 (4th Cir. 1989)(FERC license); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F2d 1041 (1st Cir. 1982)(EPA NPDES permit for oil refinery); *Keating v. FERC*, 927 F2d 616 (D.C. Cir. 1991)(FERC license); *United States v. Marathon Dev. Corp.*, 867 F2d 96, 99-101 (1st Cir. 1989)(Army Corps CWA § 404 dredge and fill permit). In *Marathon*, Defendants contended that CWA certification "applies only to individual permits, not to general permits," since CWA § 401 refers to an "applicant" for a federal license and nationwide permits require no application. *Id.*, at 101. The court rejected this contention, holding that as to the last sentence of § 401—"No license or permit shall be granted if certification has been denied by the State...": "**We interpret the sentence as meaning exactly what it says: that no license or permit—whether individual or general—shall be granted if the state has denied certification.** Such an interpretation accords not only with the plain meaning of the sentence but also with the legislative purpose and history." *Id.*, at 867 F2d 101. CWA § 401's proscriptions prohibit all federal licenses or permits that may result in a discharge—including FERC

annual licenses--from issuing without State certification.

Third, FERC licenses including annual licenses are within EPA's definition of "federal license" in 40 C.F.R. 121.1, which provide that the term "federal license or permit" under CWA § 401 "means any license or permit granted by an agency of the federal government to conduct any activity which may result in any discharge into the navigable waters of the United States," without exception. The FERC annual licenses issued at bar are federal licenses which may result in a discharge and are therefore subject to State certification under CWA § 401.

D. The Ninth Circuit Panel, in erroneously construing FPA § 15 and CWA § 401 to exempt FERC annual licenses from CWA § 401, improperly relies on inapplicable rules, and rejects the Supreme Court's governing rules of statutory construction.

The Ninth Circuit Panel reached its erroneous conclusion that FERC annual licenses should not be considered "federal licenses" under CWA § 401 by applying inapplicable rules and ignoring governing rules of statutory construction. The Panel concluded that harmonizing FPA § 15 and CWA § 401 by permitting annual licenses subject to the State granting or waiving certification would purportedly amount to a partial repeal by implication of FPA § 15, and that repeals by implication are not favored (App. 12a). The Panel rationalized that FERC annual licenses should be exempt from CWA § 401 because FPA § 15(a)(1) is supposedly a specific provision applicable to a specific situation—the continued operation of a project pending relicensing—whereas the CWA is a general statute having broad application (App. 12a). Neither of these rules of construction are applicable or warrant the Panel's decision to create a judicial exception for FERC annual licenses from CWA § 401's mandate that no federal license or permit shall be granted until State certification is granted or waived.

The Panel wrongfully rejected the construction that FPA § 15(a)(1) can be harmonized with the subsequently enacted CWA § 401 by permitting the issuance of annual licenses so long as the state has granted or waived certification for the licensee's activity. The Panel did so based on the invalid argument that as a practical matter this would amount to a partial repeal by implication of the annual license provision of FPA § 15, since CWA § 401 gives the State up to one year within which to act on a request for certification, and FPA § 15 was intended to avoid a hiatus in service. (App. 12a). The Panel failed to recognize that the request for State certification of the annual license should be made one year or more before the expiration of the existing license, thereby affording the State up to one year to grant, deny or waive certification, which will thereby be determined before the existing license expires and the new or annual license is issued. This is exactly what FPA § 15(b) provides for licensees applying for long-term relicensing—that they make their application 2 years before the expiration of the existing license. FERC has likewise required CWA § 401's application for state certification to be made concurrently with the application for the new license, 2 years before its expiration. See FPA § 15(b); 18 CFR § 16.8(a), (d)(7); 16.9(a)(b). Further, as the State represented to the Ninth Circuit, the State Board would likely certify annual licenses, subject to conditions to protect water quality. (Letter from California Attorney General to Panel dated 10-08-2002). State certification will not cause a hiatus in service when requests for certification are timely made.

The Panel's opinion is contrary to the rule that the courts are not at liberty to pick and choose among Congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts absent a clearly expressed congressional intent to the contrary, to regard each as effective. See *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984). In *Grindstone Butte*

Project v. Kleppe, 638 F.2d 100, 102-3 (9th Cir. 1981), the Court held in a set of statutes similar to those at bar that since the latter statute (the 1901 Act) was not clearly repugnant to the earlier one (the 1891 Act), both Acts should be regarded as effective and the Court interpreted them harmoniously: under the 1891 Act, any applicant who complied with the Act's requirements was entitled to an irrigation right of way; however, that entitlement was qualified by the 1901 Act authorizing the Secretary to condition the grant of rights of way over federal lands on compliance with reasonable regulations designed to protect the public interest. Similarly, here the Panel should have interpreted the 1920 FPA, which provides for FERC's issuance of annual licenses, as qualified by § 401 of the subsequently enacted 1972 CWA, which conditions all federal licenses including FERC annual licenses on State water quality certification and conditions.

The case on which the Panel relies for its contention that repeals by implication are not favored -- *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 53 n. 116-117 (D.C.Cir 1989) --refutes the Panel's contention and holds that Congress intended that FPC-licensed hydroelectric projects under the FPA are subject to the water quality standards of the CWA. In *Monongahela, supra,* the court held that the CWA is not preempted by the FPA, and a permit under CWA § 404 for the discharge of dredged or fill material into navigable waters during construction of a hydroelectric facility licensed by FERC is required. *Monongahela* noted that a half century after the FPA created the FPC, "Congress made another radical change in legislative policy by adopting the (CWA) of 1972.... to restore and maintain the chemical and biological integrity of the nation's waters,...Given the two statutory sections and their respective legislative histories, congressional intent would be betrayed by implication of an exemption of FPC-licensed hydroelectric projects from the express requirements of the Water

Pollution Control Act Amendments. We do not view this as a repeal of FPC authority but as a reconciliation seen by Congress as necessary to ensure the protection of a vital national interest...we are advertent to the maxim that repeals by implication are not favored...by giving appropriate effect to both statutory provisions, however, we fulfill congressional intent...the Federal Power Act is not immune from effects of other subsequent acts of congress." Id., at 809 F.2d 53, n. 116-117.

Finally, the Panel's statutory construction is contrary to the governing rule that where provisions in two statutes conflict, the latter to the extent of the conflict constitutes an implied repeal of the earlier one. *Posadas v National City Bank*, 296 U.S. 497, 503 (1936). In enacting the CWA in 1972, Congress is presumed to have knowledge of the 1920 FPA and its annual license provision, and the CWA as the last in time prevails as the most recent expression of Congress will. *Id.* Grindstone Butte Project , supra, at 638 F.2d 102. Thus, the 1920 FPA and its provision for annual licenses is subject to the 1972 CWA and its requirement of State certification for federal licenses.

E. The Ninth Circuit Panel improperly gave *Chevron* deference to FERC's interpretation of "annual license" in FPA § 15(a)(1) and "federal license" in CWA § 401(a)(1), while ignoring USEPA's definition of "federal license", to wrongly conclude that a FERC annual license is not a federal license subject to State certification.

The Panel erroneously gave Chevron deference to FERC's conclusion that an "annual license" issued under FPA § 15(a)(1) is not a "federal license" subject to CWA § 401(a)'s requirement that all Federal licenses which may result in a discharge are subject to State water quality certification (App 10A). While the Panel acknowledges that FERC's interpretation of the CWA is not entitled to deference, the Panel stated that FERC "held that the issuance of an annual license under § 15(a)(1) is a

ministerial and nondiscretionary act,...that ...is therefore not a licensing action that triggers the requirements of CWA. FERC's interpretation of § 15(a)(1)...is entitled to Chevron deference." (Opinion 7, 11-12). The Panel thereby improperly deferred to FERC's interpretation of "federal license" under CWA § 401 and FERC's conclusion that an "annual license" is not a "federal license" subject to CWA § 401.

This Court in *Jefferson*, supra. at 511 U.S. 712, and the Second Circuit in *American Rivers v. FERC*, 129 F.3d 99, 107 (2d Cir. 1999), held that the interpretation of the CWA and the determination of whether a FERC license is subject to CWA § 401's requirement that all federal licenses and permits obtain State water quality certification is within the jurisdiction of the USEPA. FERC's opinions on these issues are not entitled to *Chevron* deference. "FERC's interpretation of § 401 or any other provision of the CWA, receives no judicial deference under the doctrine of *Chevron*...because the Commission is not congressionally authorized to administer the CWA." *Id.* The EPA, which is charged with interpreting the CWA, has issued regulations interpreting the scope of "Federal licenses" under § 401(a) as including all Federal licenses and permits which may result in a discharge to waters of the United States, without exception, which clearly encompasses annual licenses. 40 C.F.R. Part 121, 121.1. Under the Panel's erroneous approach, any federal agency could follow FERC's mischaracterization of its annual licenses as not being "federal licenses" subject to CWA § 401, receive *Chevron* deference for such a self-serving misconstruction, and thereby avoid compliance of the agency's licenses with the CWA.

F. The Ninth Circuit Panel's statement that Congress intended to give States control only over new or altered projects and not over continued

operation of an expiring licensed project pending relicensing, is contrary to CWA § 401's statutory language and express Congressional intent that renewals of existing licenses are subject to CWA § 401 State certification.

The Panel's statement that "we think that when Congress required applicants for a license to provide a State certification, it intended to give States control over new or altered projects, not over the continued operation of a lawfully licensed project pending its relicensing," (App. 13a) is directly contrary to Congress' expressly stated intention as well as CWA § 401's plain language and the cases interpreting it.

In adopting CWA § 401, Congress expressly declared that "the provisions of this section are intended to apply to **renewals of existing licenses** or permits for any activities which discharge into the navigable waters of the U.S." including all such licenses and permits issued by the FPC, FERC's predecessor:

> Section (401) would require that applicants,...seeking a federal license or permit to conduct any activity of any kind or nature which may result in discharges into the navigable waters of the United States must provide the federal licensing or permitting agency with a certification from the affected State...that there is reasonable assurance...that such activity will be conducted in a manner that will not reduce the quality of such waters below applicable federal or state or local water quality standards...Denial of certification by a State...results in a complete prohibition against the issuance of the Federal license or permit...The provisions of this section are intended to apply to **renewals of existing licenses** or permits for any activities which discharge into the navigable waters of the United States....The purpose of the certification mechanism provided in this section is to assure that Federal licensing or permitting

> agencies cannot override state water quality requirements...the Committee continues the authority of the State...to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such state...Should such an affirmative denial occur no license or permit could be issued by such Federal agencies as the ...Federal Power Commission..." Congressional History, Water and Environmental Quality Improvement Act of 1970, PL 91-224, and Federal Water Pollution Control Act Amendments of 1972, at 1970 and 1972 U.S. Code Congressional and Administrative News, 1970--pp. 2697, 2710-2710, 2741; 1972 --p. 3735.

FPA § 15(a)(1), titled "New licenses and renewals," provides for the issuance of new licenses to the existing licensee or a new licensee, and annual licenses to the existing licensee. FPA § 15(a)(l) refers to annual licenses as **renewals** of existing licenses, as do the federal courts. See *City of Oconto Falls v. FERC*, 204 F.3d 1154, 1156 n. 4 (D.C.Cir. 2000) ("During the interim, the Commission had issued **annual renewals** of the Penobscot Mills license under the same terms and conditions as the expired license. See 16 U.S.C. § 808(a)."). Accordingly, Congress expressly declared that it intended CWA § 401 to give states control over all federal licenses and permits including renewals of existing licenses, which under FPA § 15 includes FERC annual licenses.

CWA § 401's plain language and Congressional history refute the Panel's statement that Congress intended that only new or altered projects and not the renewal of a licensed project pending relicensing to be subject to CWA § 401. As the First Circuit held in *Marathon, supra,* at 867 F2d 100: "...The legislative history of § 401 of the Act (Certification) confirms that Congress intended to give the states veto power over the grant of federal permit authority for activities potentially affecting a State's water quality...." Thus, the plain

meaning and Congressional intent of FPA § 15(a)(1) and CWA § 401(a)(1) is that a FERC annual license is a federal license subject to State certification.

VI. Conclusion.

Petitioner therefore Petitions for a Writ of Certiorari to review the Panel's Opinion and for the issuance of an opinion which correctly determines that annual licenses issued by FERC under FPA § 15(a)(l) are federal licenses subject to the requirement in CWA § 401 for State Water Quality certification.

Respectfully submitted,

John A. Slezak,
Attorney for Petitioner.

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 01-70787

CALIFORNIA TROUT, INC.

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
SOUTHERN CALIFORNIA EDISON COMPANY

Respondents,

Petition to Review a Decision of the
Federal Energy Regulatory Commission

Argued and Submitted
September 11, 2002 – Pasadena, California

Filed December 16, 2002

Before: David R. Thompson and Johnnie B. Rawlinson,
Circuit Judges, and
William W. Schwarzer,*
Senior District Judge.

Opinion by Judge Schwarzer

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* The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

John A. Slezak, Los Angeles, California,
for the petitioner.

Timm Abendroth, Washington, D.C.;
Nino J. Mascolo, Rosemead, California,
for the respondents.

OPINION

SCHWARZER, Senior District Judge:

California Trout, Inc. ("Cal Trout") petitions for review of an order of the Federal Energy Regulatory Commission's ("FERC" or the "Commission") denying its request for rehearing and for revocation of the annual license for Project 1933, operated by Southern California Edison ("Edison"). We must decide whether the Commission acted within its authority in issuing annual licenses for Project 1933 pursuant to Federal Power Act ("FPA" or "the Act") § 15(a), 16 U.S.C. § 808(a)(l), absent Edison's compliance with the State water quality certification requirement of the Clean Water Act ("CWA") § 401(a)(l). 33 U.S.C. § 1341(a)(l).

FACTUAL AND PROCEDURAL BACKGROUND

A. THE RELICENSING PROCEEDINGS

Edison operates Project 1933, the Santa Ana River Hydroelectric Project (the "Project") in San Bernardino County, California. The Project consists of two independent water conveyance and power generation systems located on the santa Ana River and its tributaries in San Bernardino County, and partly occupies lands of the United States within the San Bernardino National Forest. The Project diverts water

from the lower portion of the Santa Ana River for water supply and power generation. It has an average annual generation of nineteen gigawatt-hours, roughly enough power to serve 2000 people, and delivers water into a water distribution system in the San Bernardino Valley for municipal, domestic, and agricultural use.

The present controversy arises out of the 1996 expiration of Edison's fifty-year license for the Project, issued by the Commission's predecessor, the Feral Power Commission ("FPC"). In 1994, Edison filed an application for a new license for the project. At the same time, Edison requested water quality certification from the California State Water Resources Control Board ("California Board"). The California Board denied certification in 1995, stating that the request lacked sufficient information. Edison appealed the denial and requested that the matter be held in abeyance to facilitate discussion and possible resolution of water quality issues as well as other elicensing issues. The California Board granted Edison's request; the last abeyance ended March 19, 2002. Edison has now filed a new application for water quality certification for a new license, which remains pending.

On May 7, 1996, the Commission issued its Notice of Authorization for Continued Project Operation. The Notice referred to Edison's having filed an application for a new license for the Project pursuant to the FPA and stated:

> [N]otice is hereby given that an annual license for Project No. 1933 is issued to Southern California Edison Company for a period effective May 1, 1996, through April 30, 1997, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license . . . does not

take place on or before April 30, 1997, notice is hereby given that, pursuant to 18 C.F.R. 16.18(c), an annual license under Section 15(a)(l) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission order otherwise.

B. CALIFORNIA TROUT'S INTERVENTION

On May 31, 2000, Cal Trout filed a petition for rehearing of the Commission's issuance of an annual license for the Project for the period from May 1, 2000, to May 1, 2001.1 In that petition it contended that the Commission should not have issued an annual license without first requiring Edison to obtain water quality certification from the California Board. It maintained that the Commission should therefore vacate the annual license for the Project and order it to cease operations pending receipt of water quality certification. On June 21, 2000, the Commission Secretary issued a notice rejecting the rehearing request. The ground for the rejection was that § 15(a)(1) of the FPA mandates issuance of an annual license on the terms and conditions of the existing license, that issuance of the annual license is a ministerial act and non-discretionary and not a licensing action under the FPA, and that it therefore entails no proceeding in which intervention and rehearing may be sought. On July 21, Cal Trout filed a request for rehearing of the June 21 Notice, arguing that the Secretary had improperly rejected its earlier rehearing request. On August 18, the Commission granted rehearing for further consideration (a tolling

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1 California Trout is an incorporated nonprofit environmental organization created "to help protect, conserve and restore the rivers and streams in California." It has over 5000 members, most of whom reside in the State of California, and some of whom "use the Santa Ana River and its tributaries for fishing, camping, nature study, hiking, and other recreational and aesthetic pursuits." Its standing has not been challenged in this proceeding.

order). On March 19, 2001, the Commission finally issued the order presently under review in this proceeding.

STANDARD OF REVIEW

We review *de novo* the Commission's interpretation of its statutory mandate. The Commission's interpretation of the CWA is not entitled to deference. *American Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("FERC's interpretation of Section 401, or any other provision of the CWA, receives no judicial deference under *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), because the Commission is not Congressionally authorized to administer the CWA."). However, we do give *Chevron* deference to the Commission's interpretation of the FPA.

JURISDICTION

This court's jurisdiction to review an order of the Commission is founded on § 313(b) of the FPA which provides:

> Any party to a proceeding . . . aggrieved by an order issued by the Commission in such proceeding may
> obtain a review of such order in the United States Court of Appeals . . . by filing . . . within sixty days after the order of the Commission upon the application for rehearing, a written petition. . . .

16 U.S.C. § 825l(b).

On May 16, 2001, Cal Trout filed a petition to review the Commission's March 19, 2001 Notice, which denied the request for rehearing of the June 21, 2000, Order.

That Notice, in turn, denied a petition for rehearing of the annual license for the period May 1, 2000, to May 1, 2001. The question is whether Cal Trout has met the jurisdictional prerequisites.

The Commission contends that the court lacks jurisdiction to consider Cal Trout's challenge to Edison's annual license based on lack of compliance with CWA's requirement of state water quality certification because Cal Trout failed to seek rehearing of the Commission's May 7, 1996, Notice.2 It was this Notice that established that annual licenses would be issued during the pendency of the relicensing proceeding based on Edison's existing license, which contains no CWA certification requirement. Because Cal Trout was aggrieved by the May 7, Notice, which established annual licensing without compliance with CWA certification, the Commission argues Cal Trout's failure to seek timely rehearing of this Notice now bars it from judicial review of the 2001 order.

We think the Commission takes an unduly cramped view of what constitutes an order for purposes of judicial review. Its May 7, 1996, Notice provides for the issuance of an "annual license" subject to being "renewed automatically . . . unless the Commission orders otherwise." The Notice was issued pursuant to § 15(a)(1), which states that "[T]he Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license. . . ." Congress could readily have provided for the issuance of an interim license effective for the period of the relicensing proceedings, i.e., until issuance of a new license. It did not do so, and instead, provided for annual

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2 Section 313(a) provides: "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon." 16 U.S.C. § 825l(a).

relicensing. Its choice of language must be given effect. Even though no writing manifests the annual issuance of a license and the issuance occurs automatically, it is nevertheless an exercise of the Commission's authority and, as the Notice states, is subject to its power to order otherwise. We conclude that the annual issuance of a license is the functional equivalent of an order and is subject to review from year to year.3

Our conclusion is consistent with the decision in *Lac Courte Oreilles Band v. Federal Power Commission*, 510 F.2d 198 (D.C. Cir. 1975). There, the Commission had issued annual licenses in August 1971, 1972, and 1973. Petitioner filed an application for rehearing concerning the second of these licenses in 1972. Without questioning its jurisdiction, the court entertained the petition to review the issuance of this and a subsequent license.4

Our conclusion also makes sense as a matter of policy. The position taken by the Commission here would effectively render annual licenses immune to judicial review in perpetuity once the initial period for rehearing

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3 In its Final Order, the Commission states that under its long-standing practice, annual licenses are a post-licensing matter in which rehearing is not available except in circumstances not present here. It therefore elected to treat Cal Trout's request as a petition permitted under its rules to seek discretionary action by the Commission where no other form of pleading is available. 18 C.F.R. § 385.207(a)(5). Because such a petition gives the Commission the same opportunity as a request for rehearing to address grounds subsequently raised in a petition for review, we see no basis for making a distinction between them for purposes of Section 313.

4 *Sierra Association for Environment v. FERC*, 791 F.2d 1403, 1407 (9th Cir. 1986) ("*SAFE*"), on which the Commission and Edison rely, is inapposite. In *SAFE*, petitioners attempted to seek review of an earlier order staying the effective date of a license by challenging a later order denying a request to terminate the license. The court rejected the attempt as an impermissible collateral attack. The issue in this case is whether the May 2000, annual license is an order subject to review in this court.

has passed. The Commission's argument wrongly assumes that any ground for rehearing necessarily exists only at the time of the original issuance. Yet circumstances may change or newly arise subsequent to the original issuance of the annual license that give grounds for rehearing and potentially for the imposition of conditions to the extent permitted by law. *See Platte River Whooping Crane v. FERC*, 876 F.2d 109, 114 (D.C. Cir. 1989) ("*Platte I*") (stating that FERC has authority to formulate conditions, or seek cooperation of other parties in adding conditions to annual licenses, where the existing license contains a reservation of authority for FERC to impose conditions).

We, therefore, conclude that we have jurisdiction to review the petition under § 825(l)(b).

APPLICATION OF THE CWA TO ANNUAL LICENSES

[1] The Commission issued annual licenses to Edison under § 15(a), which provides, in substance, that if the United States does not exercise its right to take over a project at the expiration of a license, the Commission may issue a new license to the existing or a new licensee. 16 U.S.C. § 808(a)(1).5 Critical to this appeal is the following provision:

> [I]n the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an

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5 The Commission's regulations provide that "The Commission will issue an annual license to an existing licensee under the terms and conditions of the existing license upon expiration of its existing license to allow. . . (1) The licensee to continue to operate the project while the Commission reviews any applications for a new license . . . ." 18 C.F.R. § 16.18(b).

> annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.

Cal Trout contends that the issuance of annual licenses after the expiration of the original fifty-year license is subject to the requirement of State water quality certification under CWA § 401(a)(1). That statute provides in relevant part:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, . . . that any such discharge will comply with the applicable provisions of [this] title . . . . If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived. . . . No license or permit shall be granted if certification has been denied by the State.

33 U.S.C. § 1341(a)(1).

While Edison applied to the California Board for a certification for the new license, it did not apply for or receive a certification for its annual license. Cal Trout argues that the issuance of the annual licenses under the Notice of May 7, 1996, is an issuance of a federal license, which may result in discharge into the navigable waters of the United States. Those licenses are therefore subject

to § 401(a)(1). Because no water quality certification has issued, the Commission is precluded from issuing annual licenses for the project.

Rejecting Cal Trout's argument, the Commission held that the issuance of an annual license under § 15(a)(1) is a ministerial and nondiscretionary act, a statutory mechanism that requires the Commission to authorize continued project operation under the terms and conditions of the original license. It is therefore not a licensing action that triggers the requirements of CWA.

[2] FERC's interpretation of § 15(a)(1), which is entitled to *Chevron* deference, also conforms to settled law. While the Commission's issuance of project licenses under § 4(e) of the Act is subject to the State certification requirement of § 401, *see Keating v. FERC*, 927 F.2d 616, 619 (D.C. Cir. 1991), the issuance of annual licenses is a "non-discretionary act, in that the Commission has no choice but to issue the licenses to the existing licensees." *Platte I*, 876 F.2d at 114 (citations omitted). That is true even where it may lack legal authority to issue a new project license. In *Lac Courte*, the court upheld the issuance of an annual license in the face of the contention that the Indian Reorganization Act and an 1854 Treaty gave petitioner a veto power over the licensing of the project. 510 F.2d at 205.6 Only where the original licenses contain provisions allowing introduction of new conditions does the Commission have authority to add conditions, such as compliance with Section 401, without the licensee's consent. *See* 16 U.S.C. § 799 ("Licenses . . . may be altered ... only upon mutual agreement between

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6 The court held that "even if the Commission could not issue a new license over the objections of the Band, § 15(a) . . . mandates that annual licenses issue until Congress has had an opportunity to evaluate whether it desires to exercise its option of recapturing the project." 510 F.2d 204 n.21. Thus, the State's veto power under § 401 remains subject to being preempted by Congress' ability to recapture the project.

the licensee and the Commission.. . .");7 *Platte I*, 876 F.2d at 118; *Platte River Whooping Crane v. FERC*, 962 F.2d 27, 32-3 (D.C. Cir. 1992) ("*Platte II*"). Edison's license contained no such a reservation.

Moreover, Cal Trout's request that Edison's annual license be revoked for lack of certification flies in the face not only of the statutory language but also of the legislative purpose undergirding § 15(a)(1). As the court in *Lac Courte* explained:

> Congress fashioned Section 15 to prevent abrupt termination of a power project which should, in the public interest, be continued. . . . Section 15(a) annual licensees are designed to prevent a possible hiatus in the operation of a project while either of these decisions [issuance of a new license or recapture of the Project by the government] is being made, preserving the status quo at the expiration of a longterm license and thereby guaranteeing that "industries created by (Commission projects) and dependent upon them may not suffer."

510 F.2d 198, 205-06.8

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7 In view of the prohibition against nonconsensual alteration of a license of § 799, Cal Trout's reliance on § 16.18(d) of the Commission's regulations, authorizing the Commission to incorporate additional interim conditions in issuing an annual license, is misplaced. *See* 18 C.F.R. § 16.18(d).

8 *Lac Courte* further notes:

> The legislative history of the original § 15, which first appeared in the conference report to the Federal Power Act of 1920, see H.R.Rep. No. 1147, 65th Cong., 3d Sess., 9 (1919), is rather scant. However, in explaining the conference report, the Chairman of the Special Water Committee of the House stated that the annual license provisions were requested by the Senate conferees, who "were very insistent upon not having a possible hiatus" in the operation of a project until Congress had acted or a new license had been granted. 57 CONG. REC. 4637

[3] Cal Trout contends that § 15(a)(1) can be "harmonized" by permitting the issuance of annual licenses so long as the State has granted or waived water quality certification for the licensed activity. Because § 401(a)(1) gives the State up to one year within which to act on a request for certification, such an approach would, as a practical matter, amount to a partial repeal by implication of the annual license provision of § 15. Repeals by implication are not favored. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984); *Monongahela Power Co. v. Morton*, 809 F.2d 41, 53 n.116 (D.C. Cir. 1987). The authority to issue annual licenses is a specific provision applying to a specific situation, i.e., the continued operation of a project pending relicensing. The CWA, on the other hand, is a general statute having broad application. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (holding that an employment preference within the Bureau of Indian Affairs for qualified Indians could readily coexist with a general rule prohibiting employment discrimination on the basis of race). Nothing before us indicates that in enacting CWA, Congress intended to restrict the authority of the Commission to prevent a shut down of a licensed project pending relicensing. We think that when Congress required applicants for a license to provide a State certification, it intended to give States control over new or altered projects, not over the continued operation of a lawfully licensed project pending its relicensing. Reading § 15(a)(1) and § 401(a)(1) in context, we conclude that Congress did not intend "applicant" to have its literal

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(1919) (remarks of Rep. Sims). *See also* S.REP. NO. 180 ("The works must be continued in operation at the end of 50 years in order that the industries created by them may not suffer.").

510 F.2d at 206 n.33.

effect so as to include a recipient of an annual license. *See Watt v. Alaska*, 451 U.S. 259, 266 (1981).**9**

Our conclusion does not undermine the effectiveness of the CWA. Both the CWA and FPA can function comfortably side by side because no new project license or license amendment can issue without compliance with the State certification requirement. *See Keating v. FERC, supra.* Nor does it open the way to perpetual operation under annual licenses. The Commission has acknowledged that "annual licenses for [a project] will cease when the [relicensing/recapture] proceeding is completed." *Lac Courte*, 510 F.2d at 209 (quoting *Concerning Commission Authority to Issue New License, etc.*, 50 FPC 753, 773 (1973)); see also, 18 C.F.R. § 16.18(b). The *Lac Courte* court itself observed that "Commission and congressional action is proper even significantly after the license expiration date, and interim licenses should issue so long as the Commission is proceeding in good faith with the hearings necessary to make a proper disposition of the project." 510 F.2d 207 (citation omitted).10 Adopting that view, and with that caution to the Commission, we deny the petition.11

DENIED.

9That conclusion is reinforced by the fact that the licensee who receives an annual license "not only ha[s] the right, but also the obligation to operate [the project] under interim annual licenses." *Lac Courte*, 510 F.2d at
208.

10We express no view of the outcome of a case where an annual license has become a *de facto* renewal.

11Our disposition of the petition makes it unnecessary to address FERC's alternate ground under § 9(b) of the Administrative Procedure Act. 5 U.S.C. § 558(c).

APPENDIX B

[Filed February 28, 2003]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-70787

ORDER

CALIFORNIA TROUT, INC.

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION; SOUTHERN CALIFORNIA EDISON COMPANY,

Respondents.

Before: David R. Thompson and Johnnie B. Rawlinson, Circuit Judges, and William W. Schwarzer*
Senior District Judge

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*The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

The Panel has voted to deny the petition for panel rehearing. Judge Rawlinson has voted to deny the petition for rehearing en banc and Judges Thompson and Schwarzer so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc.
Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C

94 FERC
61,326

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hebert, Jr., Chairman;
William L. Massey, and
Linda Breathitt.

Southern California Edison Company
Project No. 1933-027

ORDER DISMISSING REQUEST FOR REHEARING
AND DENYING PETITION
(Issued March 19, 2001)

California Trout (Cal Trout) seeks rehearing of the Secretary's rejection of its earlier request for rehearing, which sought to contest the Commission's issuance of an annual license for the Santa Ana River Project without first requiring the licensee to obtain a water quality certification (or waiver) under Section 401 of the Clean Water Act. The 6.3-megawatt project is located on the Santa Ana River and its tributaries in San Bernardino County, California, and partly occupies lands of the United States within the San Bemardino National Forest. For the reasons discussed below, we reject Cal Trout's request for rehearing on procedural grounds and deem it to be a petition, which we deny.

BACKGROUND

The Commission issued a 50-year license to Southern California Edison Company (Edison) for the Santa Ana 1

and 2 Project No. 1933 in 1946.[1] The project was constructed in the late 1800s and early 1900s, and operates to divert water from the lower portion of the Santa Ana River for water supply and power generation. Edison filed an application for a new license for the project on April 29, 1994. On May 2, 1994, Edison requested water quality certification for its new license application from the California State Water Resources Control Board (California Board). The California Board denied certification by letter dated April 18, 1995, stating that the request lacked sufficient information. Edison appealed the denial on May 17, 1995, and requested that the matter be held in abeyance to facilitate discussion and possible resolution of not only water quality issues, but other relicensing issues as well. The California Board granted Edison's request, and, as a result, has not yet acted on Edison's appeal.[2]

On June 12, 1995, Edison filed a request to amend the license for Project No. 1933 to combine it with the separately-licensed Santa Ana 3 and to allow Edison to construct a new penstock and powerhouse to replace the powerhouses for Santa Ana 2 and 3. Edison requested the amendment because portions of the two projects would be inundated by a new flood control dam being constructed by the U.S. Army Corps of Engineers (Corps). In 1996, while the amendment request was pending, the original license for Project No. 1933 expired, and on May 7, 1996, the Commission issued a notice of the issuance of

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[1] Southern California Edison Co., 5 FPC 695 (1946), modified, 6 FPC 294 (1947). Santa Ana 1 began operating in 1899, and Santa Ana 2 began operating in 1905. Before 1946, they operated under authority of a permit granted by act of Congress dated May 1, 1906, See 5 FPC at 696.

[2] The California Board initially agreed to hold the matter in abeyance for a two- year period, but subsequently granted Edison's requests for additional two-year extensions. As a result, Edison's appeal will be held in abeyance until March 19, 2002.

an annual license authorizing continued operation.[3] The California Board issued a water quality certification for the license amendment on November 14, 1997, and the Commission granted the amendment request on March 16, 1998).[4]

Meanwhile, in 1997, Edison and interested participants, with the assistance of Commission staff, began using a collaborative process designed to resolve outstanding issues associated with relicensing the project. Edison has provided the Commission with periodic status reports on this process. In its most recent report, Edison indicated that the collaborative participants anticipate filing a settlement agreement with the Commission in July 2001.

On May 31, 2000, Cal Trout filed what it termed a request for rehearing of the Commission's issuance of an annual license for Project No. 1933 for the period from May 1, 2000, to May 1, 2001. In that request, Cal Trout argued that the Commission should not have issued an annual license without first requiring Edison to obtain water quality certification from the California Board. Cal Trout therefore maintained that the Commission should vacate the annual license for the project and order it to cease operation pending receipt of water quality certification. On June 14, 2000, Edison filed a motion for leave to answer and an answer to the rehearing request.[5] On June 21, 2000, the Commission Secretary issued a notice rejecting Cal Trout's rehearing request. The Secretary noted that, because Section 15(a)(l) of the

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[3] See Notice of Authorization for Continued Project Operation (May 7, 1996).

[4] See 82 FERC
62,179 (1998)

[5] Answers to requests for rehearing are not generally permitted. See 18 CFR 385.213(a)(2). However, because we deem Cal Trout's request to be a petition, we accept Edison's filing as an answer to the petition, which is permitted under Section 385.213(a)(3).

Federal Power Act (FPA) mandates that an annual license be issued under the terms and conditions of the existing license, its issuance is a ministerial and non-discretionary act, is not a Commission licensing action under the FPA, and entails no proceeding in which intervention and rehearing may be sought. The Secretary therefore concluded that Cal Trout's rehearing request must be rejected.

On July 21, 2000, Cal Trout filed a request for rehearing of the Secretary's June 21 notice, arguing that the Secretary had improperly rejected its earlier rehearing request. On August 18, 2000, the Commission issued an order granting rehearing for further consideration (also known as a tolling order), to allow additional time to consider the matters raised in the rehearing request. On September 5, 2000, Cal Trout requested that the Commission Secretary provide a date certain by which the Commission would rule on the merits of its rehearing request.[6] Shortly thereafter, on September 18, 2000, Cal Trout filed a request for rehearing of the tolling order, arguing that, in view of what it regarded as the time-limited nature of its claim regarding the annual license, a tolling order was inappropriate. On October 18, 2000, the Commission Secretary issued a notice dismissing Cal Trout's September 18 rehearing request on the ground that the tolling order was an interlocutory order not subject to rehearing. The Secretary also noted that Cal Trout's request for a date certain for a merits ruling was precluded by the Commission's regulations.[7]

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[6] See Letter from Jim Edmonston, Cal Trout, to David Boergers, FERC (dated September 5, 2000).

[7] See 18 CFR 3c.2(b), which provides, in pertinent part: "The nature and time of any proposed action by the Commission are confidential and shall not be divulged to anyone outside the Commission."

On December 8, 2000, Cal Trout informed the Commission Secretary that, unless the Commission immediately provided a date certain for ruling on the merits of its rehearing request, Cal Trout would seek a court order compelling the Commission to do so. On December 18, 2000, Cal Trout filed a petition for judicial review of the October 18 tolling order.[8] That petition is currently pending before the U.S. Court of Appeals for the Ninth Circuit.[9]

DISCUSSION

As noted, the Commission Secretary rejected or dismissed two of Cal Trout's three rehearing requests on procedural grounds. Thus, the only matter currently pending before us is Cal Trout's July 20 request for rehearing of the Secretary's rejection of its May 31 request. As explained below, we find that the Secretary properly rejected Cal Trout's request for rehearing, because the issuance of an annual license is a non-discretionary and ministerial action not subject to intervention and rehearing. We therefore dismiss Cal Trout's request for rehearing of the rejection. However, Cal Trout's objection to our issuance of annual licenses without first requiring water quality certification is more properly regarded as a petition under our rules.[10] Therefore, we deem the request a petition, and deny it for the reasons discussed below.

Cal Trout's Status as a Party

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[8] California Trout, Inc. v. FERC, No. 00-71671 (9th Cir. filed Dec. 18, 2000).

[9] A tolling order is an interlocutory order not subject to rehearing. See 16 U.S.C. § 825 (l)(a) and 18 CFR 16.18(c). Tolling orders are valid, and a petition for judicial review filed prior to a decision on the merits of the request for rehearing is premature. See Kokajko v. FERC, 837 F.2d 524 (1st Cir. 1988). Therefore, we do not believe that Cal Trout may properly seek judicial review of our tolling order.

[10] See 18 CFR 385.207.

Before turning to the merits of Cal Trout's petition, we believe it would be helpful to clarify Cal Trout's status as a party in this proceeding. Although Cal Trout intervened in the relicensing proceeding, its request for rehearing of the annual license issuance was not preceded or accompanied by a motion to intervene. Only parties may seek rehearing of Commission orders.[11] However, because the issuance of an annual license does not give rise to an opportunity for intervention and rehearing, we would have dismissed Cal Trout's request for rehearing of the Secretary's notice on procedural grounds even if it had sought to intervene.

Annual licensing is essentially a post-licensing matter, because it continues the terms and conditions of the original license. Under longstanding Commission practice, intervention and rehearing of post-licensing matters is limited to filings that would involve material changes in the plan of project development or in the terms and conditions of the license, or could adversely affect the rights of property holders in a manner not contemplated by the license.[12] None of those circumstances are present for issuance of an annual license, because no changes to the original license are involved.[13]

In contrast, our rules permit any person to file a petition when seeking an "action which is in the discretion of the Commission and for which this chapter

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[11] See 18CFR385.713(b).

[12] See Kings River Conservation District, 36 FERC 61,365 at p. 61,883 (1986).

[13] Cal Trout maintains that, in past cases, the Commission has allowed challenges to annual licenses by parties to relicensing proceedings. See Cal Trout's Request for Rehearing at 14 (filed July 21, 2000). However, the cases on which Cal Trout relies all occurred in the 1970s, before the non-discretionary nature of annual licensing had received judicial recognition.

provides no other form of pleading."[14] Moreover, the petitioner is a party to a proceeding on the petition, without the need to file a motion to intervene.[15] Therefore, as a petitioner, Cal Trout is automatically afforded party status with regard to its-petition.

In its petition, Cal Trout argues that the Commission's issuance of an annual license for Project No. 1933 without first requiring Edison to obtain water quality certification from the California Board violates Section 401 of the Clean Water Act (CWA). Cal Trout also maintains that the issuance of an annual license is not a ministerial and non-discretionary act, and that the Commission's regulations recognize this. Cal Trout further maintains that the issuance of an annual license constitutes a licensing action under the FPA and the CWA, and that Cal Trout may challenge it by filing a request for rehearing. Cal Trout therefore requests that we reconsider the Secretary's notice, grant its petition, and withdraw Edison's annual license for the project until it obtains water quality certification pursuant to Section 401 of the CWA.

In our view, Cal Trout's arguments disregard pertinent provisions of the FPA and misconstrue Section 401 of the CWA. They also overlook obvious ways to harmonize the two statutes without unnecessarily creating an

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[14]18 CFR 385.207(a)(5). We note that, although it styled its initial filing as a request for rehearing, Cal Trout cited section 385,207(a)(5) as part of the basis for its request. Moreover, Cal Trout in its initial filing sought to challenge the Commission's issuance of annual licenses for each and every year beginning in 1996. See Cal Trout's Request for Rehearing at 2, 6 (filed July 21, 2000). Accordingly, its request, if considered a request for rehearing, would have been incurably late for all years prior to 2000, because a request for rehearing must be filed no later than 30 days after any final Commission decision. See 18 CFR 385.713(b) and Section 313 of the FPA, 16 U.S.C. § 8251.

[15]See 18CFR385.102(c).

irreconcilable conflict between them. Finally, they ignore the authority for continued operation provided by Section 9 of the Administrative Procedure Act (APA). We therefore deny Cal Trout's petition.

Section 15(a)(1) of the FPA

Under Section 15(a)(l) of the FPA, if an existing license for a hydroelectric project will expire before the issuance of a new license, the Commission is required to "issue from year to year an annual license to the then licensee under the terms and conditions of the existing license ... until a new license is issued."[16] It is well settled that the issuance of an annual license in these circumstances is a ministerial and non-discretionary act, compelled by statute.[17] As the court recognized in Lac Courte Oreilles.

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[16] Section 15(a)(l) of the FPA provides:
That if the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the Commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the existing license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amounts, and assume such contracts, as the United States is required to do, in the manner specified in Section 14 hereof: Provided,
That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.

16U.S.C.§808(a)(l).

[17] See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Federal Power Commission, 510 F.2d 198, 203-10 (D.C. Cir, 1975); Swinomish Tribal Community v. FERC, 627 F.2d 499, 506 (1980); Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 876 F.2d 109, 114 (D.C. Cir. 1989) ("Platte I"); see also Platte

Section 15(a)(l) not only requires the Commission to issue annual licenses, even if its authority to issue a new license may be in question, but also requires the existing licensee to continue operating the project under annual licenses pending Commission disposition of the relicense application.[18]Based on its review of the language, legislative history, and policies of that section, the court observed:[19]

> Congress fashioned Section 15 to prevent abrupt termination of a power project which should, in the public interest, be continued, but with respect to which the identity of the operator and the exact method of operation must be reevaluated

In essence, an annual license is a statutory mechanism that requires the Commission to authorize continued project operation under the terms and conditions of the original license, thus tolling its expiration date.[20] Because issuance of an annual license is a ministerial and non-discretionary act, it is not a licensing action that triggers the requirements of the National Environmental Policy Act (NEPA) or other statutes.[21]

River Critical Habitat Maintenance Trust v. FERC, 962 F.2d 27, 30 and 33 n.2 (D.C. Cir. 1992) ("Platte II")

[18] Lac Courte Oreilles, id., 510 F.2d at 205 n. 26.

[19]Id. at 206.

[20]Swinomish Tribal Community, note 12 supra. 627 F.2d at 506. For this reason, an annual license can be amended in the same manner as an original license. *Id.* However, because Section 6 of the FPA provides that licenses can only be altered "upon mutual agreement between the licensee and the Commission," the Commission may not impose changes unilaterally unless the original license expressly reserves the Commission's authority to do so. See Platte II, note 12 supra. 962 F.2d at 32.

[21] Central Nebraska Public Power and Irrigation District, 43 FERC 61,225 at p. 61,577(1988), affd in part, Platte I, note 12 supra. 876 F.2d at 113; Upper Peninsula Power Co, 50 FERC If 61,264 (1990); Platte II, note 12 supra. 962 F.2d at 33 n. 2 (issuance of annual license

Cal Trout maintains that, because the FPA does not define "license" or "licensing action," these terms must be assumed to have their ordinary meaning and that issuance of an annual license is therefore a licensing action under both the FPA and CWA. However, if an action is not a licensing action under the FPA, we do not understand how it could nevertheless be considered so for purposes of the CWA. As explained above, Cal Trout's argument ignores the mandatory nature of Section 15(a)(l) of the FPA. It also overlooks the differing treatment accorded under the FPA to licensing actions, such as issuance of original and new licenses, which are clearly discretionary and are subject to various statutory requirements.[22]

As will be seen, this does not mean that the Commission may ignore Section 401 of the CWA. Rather, it is well settled that the Commission must observe the requirements of Section 401 before it can issue an original or a new license under the FPA, or before it can issue a license amendment that may result in a discharge.

Section 401 of the CWA

Despite the non-discretionary nature of an annual license under the FPA, Cal Trout argues that we are precluded from issuing one if an existing licensee has not

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is not an "agency action" requiring formal consultation under Section 7(a)(2) of the Endangered Species Act).

[22]For example, licenses under the FPA must balance a variety of public interest factors, including power production and environmental values, under Section 4(e) of the FPA, and must include conditions based on agency recommendations to protect, mitigate, and enhance fish and wildlife resources under Section 10(j) of the FPA. to Platte II, the court accepted the Commission's interpretation that these sections of the FPA, which apply to licensing actions such as the issuance of original and new licenses, do not apply to annual licenses. Platte II, note 12 supra. 962 F.2d at 33.

first obtained water quality certification pursuant to Section 401 of the CWA. That section requires any applicant for a federal license or permit to conduct an activity which may result in a discharge into navigable waters to provide to the federal licensing or permitting agency a state certification that any such discharge will comply with the applicable provisions of the CWA. Section 401 further provides that no license or permit shall be granted until certification has been obtained or waived.[23]

Cal Trout argues that, because the California Board denied Edison's request for certification in connection with its relicense application, Section 401 by its terms precludes the Commission from issuing an annual license for the project. In support, Cal Trout relies on the language of Section 401 that prohibits the grant of a license or permit if certification has been denied. However, Cal Trout's argument ignores the first sentence of Section 401, which imposes the obligation to seek certification on "any applicant for a Federal license or permit" (emphasis added). As explained above, under the FPA, an existing licensee is statutorily entitled to an annual license, without the need to apply for one, and the

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[23] Section 401(a)(l) provides, in pertinent part:
Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, . . , that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.. .. If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State ....
33U.S.C, § 1341.

Commission is statutorily required to issue it. Therefore, the licensee is not an "applicant for a Federal license or permit" within the meaning of Section 401 of the CWA, and consequently need not request certification from the state before receiving an annual license.[24]

In contrast, an existing licensee is not automatically entitled to a new license under the FPA, and must file an application with the Commission if it is interested in obtaining one. Accordingly, the Commission requires that applicants for new licenses provide evidence in their license applications of their request for water quality certification.[25] Moreover, the Commission routinely observes that it may not grant an application for either an original or a new license for a hydroelectric project

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[24] See Public Utility District No. 1 of Jefferson County v. Washington Dept. of Ecology ("Jefferson County"), 511 U.S. 700, 711 (1994), in which the Supreme Court found significant the use of the word "applicant" in Section 401(d) of the CWA, which concerns a state's authority to condition a certification under Section 401(a)(l), If the term is significant in Section 401(d), we do not see how we could reasonably ignore its existence in Section 401(a)(l). However, that is exactly what Cal Trout's interpretation would require us to do.

[25] See 18 CPR 16(f)(7), which requires a license applicant to include in its application one of the following: a copy of the certification; a copy of the request for certification, including proof of the date of receipt by the certifying agency; or evidence that certification was waived. The regulation further provides that, if certification is denied, the applicant must file a copy of the denial within 30 days after the applicant received it. *Id.* The Commission's policy is to keep the license application on file until the applicant has exhausted its remedies on administrative and judicial appeal, so long as the applicant continues to demonstrate due diligence to pursuing those remedies. For original license applications, the Commission will dismiss the application after denial of a second certification request, unless an appeal of the first denial is pending. For relicense applications, which involve existing projects that continue to operate under annual license or Section 9(b) of the APA, applicants are afforded greater flexibility with respect to their applications, and do not face automatic rejection after two certification denials. See West Perm Power Co., 74 FERC

61,287 at p. 61,913 n. 14 (1996).

unless the state certifying agency has granted or waived certification.[26]

Cal Trout recognizes that repeals by implication are not favored, and that statutes should be harmonized if possible. Despite this, Cal Trout maintains that the only way to reconcile the requirements of Section 401(a)(l) of the CWA with Section 15(a)(l) of the FPA is to conclude that the certification requirement applies to the issuance of annual licenses.[27] In the alternative, Cal Trout argues, we must conclude that, in enacting Section 401(a)(l), Congress implicitly repealed the annual license provision of the FPA. We disagree. Cal Trout's interpretation ignores the mandatory language used in Section 15(a)(l) of the FPA, and prevents its statutory purpose from being realized. It also ignores the plain language of Section 401(a)(l), which imposes the requirement to seek certification only on an applicant for a federal license or permit. Section 401(a)(l) can be given full effect, without eviscerating or repealing Section 15(a)(l), by applying the certification requirement only when an applicant is required to obtain a federal license under the FPA; that is, for an original or a new license, or an amendment that may result in a discharge. For annual licensing, which is non-discretionary and requires no application, the certification requirement is never triggered, because the

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[26]See. e.g.. Avista Corporation, 90 FERC

61,167 at p. 61,509 (2000).

[27] In support, Cal Trout argues that nothing in the CWA indicates any Congressional intent to exempt hydroelectric licenses issued under the FPA, citing Jefferson County, note 23 supra: Monongahela Power Co. v. Marsh, 809 F.2d 41 (D.C.Cir. 1987); and Scenic Hudson Preservation Conference v. Callaway, 307 F. Supp. 162 (S.D.N.Y. 1973), affd. 499 F.2d 127 (2d Cir. 1974). All three cases involved applications for an original license, and the latter two concerned dredge and fill permits under Section 404 of the CWA. There is nothing in these decisions that would support a decision to apply the Section 401 certification requirement to annual licenses under the FPA.

annual license simply provides that the original license continues in effect pending relicensing.

Section 16.18(d) of the Commission's Regulations

Cal Trout argues that, because Section 16.18(d) of our regulations recognizes the possibility of incorporating additional or revised interim conditions in annual licenses, their issuance cannot be a ministerial and non-discretionary act.[28] However, the Commission has no inherent authority to amend a license, whether the original license, a new license, or an annual license. Section 6 of the FPA specifically provides that licenses may be altered only upon mutual agreement between the licensee and the Commission. Therefore, the Commission may not require a licensee to make changes to project facilities or operation unless the license includes reservation of our authority to require such changes.[29] Implicit in Section 16.18(d) is the prerequisite that the Commission had in the original license, and therefore has in the annual license, the appropriate reservation of authority to unilaterally impose any such conditions.[30]

Thus, Section 16.18(d) does not affect the non-discretionary nature of our issuance of annual licenses under the FPA. Rather, it simply recognizes that we may incorporate additional or revised interim conditions in an annual license if the original license reserved our authority to do so. Cal Trout further maintains that Section 16.18(d) retains our discretion by providing that annual licenses "will be considered renewed automatically without further order of the Commission, unless the Commission orders otherwise," Contrary to

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[28]See CFR 16.18(d).

[29] See, e.g., Platte II, note 12 supra: Department of the Interior v. FERC, 952 F.2d 538, 546-48 (D.C. Cir. 1992); State of California v. Federal Power Commission 346 F 2d 917, 921-25 (9th Cir. 1965).

[30] See Central Nebraska Public Power and Irrigation District, 50 FERC 61 180 at p. 61,530 n.27 (1990), affd. Platte II, note 12 supra.

Cal Trout's assertion, this provision does not change the non-discretionary nature of our issuance of annual licenses. Instead, it recognizes that the Commission can discontinue the automatic issuance of annual licenses when circumstances would warrant that result.[31]

Section 9(b) of the Administrative Procedure Act

Even if we were to accept Cal Trout's views regarding the applicability of Section 401 to annual licensing, which we do not, Cal Trout ignores the fact that continued project operation would nevertheless be authorized pursuant to Section 9(b) of the Administrative Procedure Act (APA). That section provides that, if a licensee has made a timely and sufficient application for a license renewal, the license "does not expire until the application has been finally determined by the agency."[32] It operates independently of any annual licenses that may be issued under the FPA, and continues the original license to effect until the Commission takes final action on the relicense application.[33] Because the Commission need not

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[31] See Order No. 513-B, Docket No. RM87-33-002, 50 FERC 61,241 (1990). If, for example, a project is not required to be licensed under Section 23(b)(l) of the FPA and the applicant rejects a new Section 4(e) (voluntary) license for a project, the Commission rescinds the new license order and terminates the annual license. See Duke Power Co., 74 FERC 61,291and 61,292 (1996).

[32] "Section 9(b) of the APA provides, in pertinent part:

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency. 5 U.S.C. § 558(c).

[33] See Wisconsin Electric Power Co., 73 FERC 61,208 at p. 61,570 1995), OMYA, Inc., 65 FERC 61,376 at p. 63,022 (1993). The latter case involved a stay of a subsequent license (a particular type of relicense) pending rehearing, because the Vermont Water Resources Board had determined that the water quality certification for the subsequent license was void. to

issue a "license" for this statutory extension of the original license to apply, there would be no triggering event for which Section 401 certification could be required.

Finally, we note that, although Cal Trout has alleged that Edison's operation of its project is causing water quality violations, Cal Trout provides no evidentiary basis for these allegations. Rather, the only support Cal Trout offers for its assertions is its legal theory, which we reject, that water quality certification is required for continued project operation pending relicensing.[34] The project has continued to operate in the same manner that it has in the past, and its license to do so predates the CWA. If changes are to be made to the project or its operation to address water quality concerns, these must

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issuing the stay, the Commission observed that continued operation of the project was authorized pursuant to Section 9 of the APA. Vermont later issued a new certification, and the Commission amended the subsequent license to include the new 401 conditions. See 74 FERC 61,353 (1996), affd. OMYA Inc. v. FERC, 111 F.3d 179 (D.C. Cir. 1997).

[34] Cal Trout alleges that the project's diversion of water from the Santa Ana River damages the beneficial use of the river for cold water fishery habitat and spawning, and exceeds water quality criteria for dissolved oxygen and temperature. As noted, however, Cal Trout provides no factual support for this allegation. Although Cal Trout specifically refers to Edison's diversion of water from the Santa Ana River and its tributaries to June 1999, there is nothing to suggest that this diversion was anything other than that already authorized under the existing license, as amended by the relocation of the powerhouse and flowline that the Commission authorized in 1998, and for which the California Board issued water quality certification. See note 4, supra. Edison was required to comply with Section 401 for its amendment application, and did so. The only application for which the certification requirement is outstanding is Edison's relicense application. As noted earlier, the California Board has not yet issued a final decision with respect to certification of that application. If Edison's appeal were ultimately denied with no reasonable prospect of a satisfactory resolution, the Commission would have to require Edison to surrender its license and stop operating the project.

be made either at relicensing or pursuant to an appropriate reservation of authority in the original license. We find nothing in Cal Trout's petition to suggest that we should undertake an investigation into whether any changes might be needed pending relicensing.

For all the foregoing reasons, we dismiss Cal Trout's July 21, 2000 request for rehearing, deem it a petition under our rules, and deny the petition,

The Commission orders:

(A) The request for rehearing filed by California Trout on July 21, 2000, is dismissed, and the filing is deemed a petition pursuant to 18 CFR 385.207(a)(5).

(B) California Trout's petition of July 21, 2000, seeking revocation of the annual license for Project No. 1933, is denied.

By the Commission.

(SEAL)

David P. Boergers,
Secretary.

APPENDIX D

STATUTES INVOLVED IN THE CASE

Section 15(a)(1) of the Federal Power Act (FPA), 16 U.S.C., Section 808(a)(l):

Section 808. New Licenses and renewals

(a) Relicensing procedures; terms and conditions; issuance to applicant with proposal best adapted to serve public interest; factors considered

(1) If the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the existing license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title; Provided, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.

Section 401(a)(1) of the Clean Water Act (CWA), 33 U.S.C. Section 1341(a)(1):

Section 1341(a)(1). Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(2) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit

shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.